Supreme Court, U. S.
FILED
JUL 5 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 77-321

KENNETH CHIN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRA D. LONDON
IRA D. LONDON, CAROL MELLOR, *Of Counsel*
Attorneys for Petitioner
547 86th Street
Brooklyn, New York 11209
(212) 238-1400

(10247)
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
A. The Receipt Count	4
B. The Transportation Count	6
Reasons for Granting the Writ	6
Conclusion	9

TABLE OF CITATIONS

Cases Cited:

Lamar v. United States, 241 U.S. 103 (1916)	7
Pierce v. United States, 314 U.S. 306 (1941)	7
United States v. Sullivan, 332 U.S. 689 (1948)	7

Statutes Cited:

18 U.S.C. §2	5
18 U.S.C. §922(a)(3)	3, 4, 5, 8

Contents

	Page
28 U.S.C. §1254(1)	2

APPENDIX

Order of the United States Court of Appeals for the Second Circuit Affirming the Conviction	1a
Order of the United States Court of Appeals for the Second Circuit Denying Rehearing	3a
Order of the United States Court of Appeals for the Second Circuit Denying Rehearing En Banc	5a

In The

Supreme Court of the United States

October Term, 1976

No.

KENNETH CHIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court.

Petitioner, Kenneth Chin, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made final in this proceeding on May 10, 1977.

OPINIONS BELOW

The District Court for the Eastern District of New York, where this case was tried, rendered no opinion on the issues here presented. The Court of Appeals for the Second Circuit affirmed the convictions herein from the bench, with oral opinion, on March 21, 1977. The order of the Second Circuit, denying re-hearing and re-hearing en banc was made on May 10, 1977.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 21, 1977. A timely petition for re-hearing and re-hearing en banc was denied on May 10, 1977. A motion for extension of time in which to bring this petition for a writ of certiorari was made by petitioner, and was granted by order of the Honorable Associate Justice Thurgood Marshall dated June 7, 1977 which order extended petitioner's time to file this petition to and including July 5, 1977.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Does a United States Court of Appeals have the power to interpret a criminal statute in such a way as to eliminate an element of the crime, which element is present in the statutory definition of the crime, or does such action violate the constitutional principles of separation of powers, due process and equal protection?

2. Does a judicial interpretation of a criminal statute which eliminates an element of that crime as defined by Congress render the statute unconstitutionally vague?

3. Must a trial court include in its charge to the jury all elements of the crime alleged in the indictment?

4. May a conviction for the crime of transportation of a weapon in violation of Title 18, United States Code, Section 922(a)(3) be based solely upon inferences drawn from subsequent possession of the weapon?

STATUTES INVOLVED

The statute involved is Title 18, United States Code, Section 922(a)(3) which states, in relevant part:

"§922. Unlawful acts

(a) It shall be unlawful—

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a rifle or shotgun obtained in conformity with the provisions of subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter; . . . ."

STATEMENT

Petitioner, a United States citizen of Chinese ancestry and a decorated Viet Nam war veteran had judgment entered against him in the United States District Court for the Eastern District of New York convicting him, after jury verdict, of two counts of violation of Title 18, United States Code, Section 922(a)(3). One count charged transportation of a hunting rifle, and the other count charged receipt of that same firearm.

The Government's case consisted of proof tending to show that one Elizabeth Young, with whom petitioner had lived in Brooklyn, New York prior to the time in which the crimes were alleged to have occurred and subsequent thereto, purchased a hunting rifle in California. That hunting rifle was discovered over two months later in the apartment in Brooklyn, New York shared by petitioner and Young. There was no evidence that petitioner was ever in California, and the Government conceded that he was in New York at all relevant times.

Other than the bare fact that the hunting rifle was in the apartment in which petitioner lived (exact location of the hunting rifle within the apartment was not established at trial), there was no evidence connecting or tending to connect petitioner with that particular firearm.

A. The Receipt Count

One count upon which petitioner was convicted charged him and Young with receiving a firearm which had been transported by them, after it had been purchased or otherwise obtained by them in California. An elemental analysis of the statute upon which this charge was based reveals that Congress has declared that the following conduct is criminal:

"1. Receipt
2. In the state where he resides

3. Of any firearm
4. Purchased or otherwise obtained
5. By such person
6. Outside the state." Title 18 U.S.C. §922(a)(3).

Petitioner argued to the United States Court of Appeals for the Second Circuit that the charge of the trial court was fatally defective in that the essential elements recited by the trial court to the jury failed to define a crime in conformity with the statute. Completely omitted from the charge was the element that the person who received the weapon must be the same person who obtained the weapon (the fifth element recited above).

The Government did not argue that this element was, in fact, charged to the jury. Instead, the Government postulated that petitioner's argument must be wrong, for it would result in the impossibility of application of Title 18, United States Code, Section 2 to the crimes created by Title 18, United States Code, Section 922(a)(3).

Petitioner replied that he did not intend to suggest that accessorial culpability was precluded by his reading of the statute. Under the proper set of facts and circumstances a person might be found guilty of having aided or abetted or caused the transportation or receipt of a firearm. The gravamen of petitioner's argument was that the court's failure to include this unique element of this crime in its charge to the jury was error.

The Court of Appeals for the Second Circuit, speaking through the Honorable William H. Timbers, C.C.J., stated at oral argument and in the oral opinion* that petitioner was

* Under the practice of the Second Circuit, a person is entitled, upon request, to a transcript of an oral opinion rendered in a case in which the person is a party. Petitioner made a written request for a transcript, but was informed that the recording mechanism was defective and therefore he could not receive a transcript. Thus, the opinion of the Circuit Court is paraphrased herein based on the recollection of counsel and petitioner, who was present at oral argument.

correct as to the presence of the phrase "obtained by such person" in the statute, and was probably correct in his interpretation of those words. However, the Circuit Court could not accept, as a matter of logic, that Congress had meant what it said, and therefore, the Circuit Court rejected petitioner's argument and affirmed the conviction.

B. The Transportation Count

With reference to the transporation count, petitioner argued that his conviction was obtained in violation of due process of law in that the jury was charged that he could be found guilty solely upon the inferences drawn from possession of the firearm. The trial court told the jury that:

> "There is no evidence, as I have said before, that the defendant Chin in any way participated in the transportation of any of the weapons into the State of New York."

And then stated:

> "But if you find that the weapon was transported from California into New York *you may infer from that possession that the defendant Chin participated in the transportation of that weapon.*" (Emphasis supplied.) (Appendix to Appellants' Briefs on Appeal, pp. 94, 99).

The Circuit Court of Appeals rejected petitioner's argument, stating merely that the evidence was sufficient to sustain the conviction.

REASONS FOR GRANTING THE WRIT

The writ should be granted to rectify the grave injustice of the instant case, and to reaffirm the limited role of federal courts

in the interpretation of statutes. The Circuit Court has re-written a statute, and, in doing so, has created a new and different crime from the one created by Congress.

The tripartite framework of government created by the Constitution of the United States must remain inviolate for our Constitution to survive. Re-affirmance of the principle inherent in the phrase "separation of powers" is necessary whenever one branch of our government intrudes upon the constitutionally defined sphere of another branch.

It is hard to imagine a clearer example of judicial intervention in Congressional perogative than that presented herein. The crime created by Congress contains elements not charged by the Court and not proven by the Government, to wit, "purchased or otherwise obtained by such person." Yet, the Circuit Court affirmed, stating that Congress did not intend this particular crime of receipt to differ from the other receipt crimes in Title 18. The words "purchased or otherwise obtained by such person" are, therefore, stripped of their meaning, by the Circuit Court. By affirming this conviction, the Circuit Court held that receipt from another person with knowledge of prior illegal transportation is a crime, in spite of Congress' definition of the crime to be receipt of a weapon which had been purchased or otherwise obtained by the person who receives it.

The Supreme Court of the United States has stated that the primary source for ascertaining the meaning of a statute is the statute itself. If the words are unambiguous, the meaning clear, the Court's task is at an end. *United States v. Sullivan,* 332 U.S. 689 (1948). An act should be read "so as . . . to give full effect to its plain terms." *Lamar v. United States,* 241 U.S. 103, 112 (1916). A court "should not depart from an act's words and context." *Pierce v. United States,* 314 U.S. 306, 311, 312 (1941). The Circuit Court has not rejected defendant's choice of interpretation of the phrase placed in the statute by the legislators; it acknowledged the phrase and its meaning; it simply

rejects the phrase. The entire qualifying phrase limiting the scope of the proscribed conduct has been discarded by the Second Circuit, and that court thereby attempts to create a new crime.

It is the responsibility of the Supreme Court of the United States to prevent erosion of the principles of the Constitution of the United States. It is respectfully suggested by petitioner that this case presents a clear and dangerous incursion by the judiciary into the realm of Congress. Petitioner asks that he be given the opportunity to present a fully developed and well documented argument showing the action of the Second Circuit Court of Appeals herein to be in violation of the Constitution of the United States.

Additionally, petitioner asks this Court to allow him to show the due process violations inherent in a criminal conviction for violation of a *malum prohibitum* statute based solely upon inferences drawn from possession of an item, while mere possession of the item itself is neither a common law or statutory crime. With the recent proliferation of regulatory criminal statutes, petitioner suggests that clarification of the parameters of criminal liability based on these statutory crimes is in order. The basic question to be considered is whether the inferences arguably allowable in the prosecution of the common law crime of transportation of stolen property, *i.e.*, unexplained possession inferring participation in the previous illegal transportation, can be applied to Title 18, U.S.C., Section 922(a)(3). The unique characteristics of the crime defined by Title 18, United States Code, Section 922(a)(3), the significance of which petitioner seeks to explore before this Court are 1) violation of Title 18, U.S.C. Section 922(a)(3) is a *malum prohibitum* crime, in which criminal intent is not an element and 2) mere possession of the weapon so transported is not, per se, a crime. It is petitioner's position that these factors render application of the inference of participation in the transportation from mere possession, and basing a conviction solely upon this inference, a violation of due process.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should issue its writ of certiorari to review the decision below.

Respectfully submitted,

s/ Ira D. London
Attorney for Petitioner

Ira D. London
Carol Mellor
Of Counsel

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING THE CONVICTION

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of March one thousand nine hundred and seventy-seven.

Present:

HON. WILLIAM H. TIMBERS

HON. THOMAS J. MESKILL
Circuit Judges

HON. CONSTANCE B. MOTLEY
District Judge

United States of America,

Plaintiff-Appellee-Appellant,

v.

Kenneth Raymond Chin, Elizabeth Jane Young, n/k/a Elizabeth Jane Young Chin,

Defendants-Appellants-Appellees.

Order of the United States Court of Appeals for the Second Circuit Affirming the Conviction

76-1420
76-1517
76-1456

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

by Arthur Heller
Deputy Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of May, one thousand nine hundred and seventy-seven.

Present:

HON. WILLIAM H. TIMBERS

HON. THOMAS J. MESKILL
Circuit Judges

HON. CONSTANCE BAKER MOTLEY
District Judge

United States of America,

Plaintiff-Appellee,

v.

Kenneth Raymond Chin, Elizabeth Jane Young, n/k/a Elizabeth Jane Young Chin,

Defendants-Appellants.

Order of the United States Court of Appeals for the Second Circuit Denying Rehearing

76-1420
76-1456
76-1517

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Kenneth Raymond Chin,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING REHEARING EN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of May, one thousand nine hundred and seventy-seven.

United States of America,

Plaintiff-Appellee,

v.

Kenneth Raymond Chin, Elizabeth Jane Young, n/k/a Elizabeth Jane Young Chin,

Defendants-Appellants.

76-1420
76-1456
76-1517

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Kenneth Raymond Chin, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge